



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 2, 1997

Mr. William Krueger, III  
Fletcher & Springer, L.L.P.  
823 Congress Avenue, Suite 510  
Austin, Texas 78701

OR97-2627

Dear Mr. Krueger:

You ask if certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 111052.

The parent of a deceased child asked the city of Leander (the "city") for a copy of the 911 calls requesting help for the child and for all other records pertaining to the child. You submitted to this office for review the responsive audio tape recording of the 911 calls and other records pertaining to the child. You assert that the information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code.

Most of the records submitted to this office are Emergency Medical Service ("EMS") patient records and other medical records pertaining to the child. Access to these types of records is governed by statutes other than chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991) (section 552.103 litigation exception not applicable to documents where access is governed by provisions outside of Open Records Act). Section 773.091 of the Health and Safety Code (the "EMS Act") provides:

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Section 773.093 of the Health & Safety sets out the conditions for release of such confidential patient information. Generally, EMS patient records must be released upon the written consent of a personal representative of a deceased patient. *See* Open Records Decision No. 632 (1995) (defining "personal representative" for purposes of the EMS Act).

The written consent must specify (1) the information covered by the release, (2) the reasons or purpose for the release, and (3) the person to whom information is to be released. Health & Safety Code § 773.093(a). The EMS patient records may be released only as outlined under section 773.093.

Other records at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Sections 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the written consent of a deceased patient's personal representative, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records must be consistent with the purposes for which the records were obtained. Open Records Decision No. 565 (1990) at 7. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

We will address the city's 552.103(a) claim as to the 911 tape and police report by R.W. Taggart.<sup>1</sup> To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. In Open Records Decision No. 452 (1986) at 4, this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

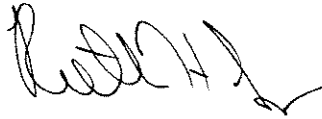
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<sup>1</sup>We note that the report contains information from the child's medical records that is subject to the Medical Practice Act and must be released as previously discussed.

This office has determined that litigation is reasonably anticipated when a potential opposing party has hired an attorney and that attorney has threatened to bring suit against the governmental body. Open Records Decision No. 555 (1990). However, when an individual publicly threatens suit but does not actually take objective steps toward filing suit, this is not sufficient to establish that litigation is reasonably anticipated. Open Records Decision No. 331 (1982). In this situation, the city has not demonstrated that objective steps have been taken so that there is concrete evidence of anticipated litigation. Thus, section 552.103 is inapplicable. The information at issue must be provided to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: #111052

Enclosures: Submitted documents

cc: Andra Read  
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Leander, Texas 78641  
(w/o enclosures)